NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: Jane Bailey v. Virginia Employment Commission and Quest Diagnostics Incorporated, Case No. *CL 2017-5655*

Dear Counsel:

This matter came before the Court on a Petition for Judicial Review filed by Jane Bailey against her former employer Quest Diagnostics, Inc. and the Virginia Employment Commission.

OPINION LETTER

For the reasons set forth below, the Petition for Judicial Review is granted and this matter is remanded.[1]

Background

Jane Bailey ("Petitioner") was employed by Quest Diagnostics, Inc. ("Defendant") as a full-time Medical Technologist for almost twenty years. On September 21, 2016, Petitioner provided Defendant a copy of a doctor's note ("the Note") given to Petitioner by her treating physician. The Note indicated, in an interlineated statement, that Petitioner was not to use her right hand. On September 30, 2016, Petitioner was terminated from her position after Petitioner's supervisor accused the Petitioner of altering the Note to include the interlineated statement.[2]

This is the short version of the events, and on its face, it appears reasonable. That is why it is helpful to look at the facts in detail. And when this is done, the result is unreasonable, legally deficient and both arbitrary and capricious.

The Petitioner injured her right hand during the course of her employment and while engaged in her duties as a Medical Technologist for Quest Diagnostics. Quest claimed that it accommodated the Petitioner by assigning to her duties which did not require the use of her right hand. Initially, the Petitioner's treating physician provided a note indicating that the use of her right hand was restricted until September 30, 2016. On September 15, 2016, the Manager of Employee Health and Safety sent an email to Petitioner's Supervisor reminding her to inform the Petitioner that an update from the doctor was necessary given that the September 30, 2016 date was approaching.

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[1] References to the record shall refer to Record of Proceedings in the Matter of Jane Bailey v Virginia Employment Commission and Quest Diagnostics Incorporated, Case No. *CL 2017-5655*

[2] While the termination for misconduct occurred in September of 2016, the court notes with interest that Quest, three months earlier, in a performance review, noted certain deficiencies in the Petitioner's performance and Quest tasked Virginia Aleemi, the Petitioner's Supervisor, with ongoing monitoring responsibilities. (Record p 22) It was Ms Aleemi who decided that the physician note was altered, resulting in the Petitioner's ultimate termination for misconduct She was also Quest's designated witness against Petitioner at the Appeals Examiner hearing.

It is likewise interesting to note, that although the Petitioner's termination was for misconduct, Quest nonetheless referenced the Petitioner's numerous performance issues when responding to the Petitioner's claim for unemployment benefits and even submitted these performance evaluations into the record. (Record p. 22-23 and p 128-129)

While the Appeals Examiner, as will be shown below, placed no impediments to the admission of these irrelevant documents by Quest, he did prevent Petitioner from submitting relevant and exculpatory documentation at the hearing (Record p.75)

On September 20, 2016 the Petitioner informed her Supervisor that she had a new note and that she had submitted it to the nurse. The nurse claimed not to have received the note even though Petitioner produced a copy of the note the next day which was dated September 12, 2016. The note originally stated "minimal work." Those words were crossed out and in its place the words "no use of right hand" were inserted.

The nurse from Quest (see footnote 6, below) contacted the doctor's office because she was suspicious of the interlineation. She called the doctor's office and asked the receptionist (not the physician) whether the doctor's office would have given the Petitioner a note with information crossed out and written over. The "office" said it would not do so. The Petitioner was then suspended on September 27, 2016. On September 30, 2016, after 20 years of service, the Petitioner was called on the telephone and was terminated for misconduct: providing a falsified doctor's note.

Thereafter Petitioner was denied unemployment benefits and she appealed the termination to the Virginia Employment Commission. ("VEC") At this point she entered the labyrinth of the VEC appellate process.

In her *Statement Concerning Discharge/Suspension* which Petitioner filed with VEC on November 28, 2016, the Petitioner denied, without equivocation, that the document was altered. (Record p. 28) This document was signed with the following certification and *made part of the record*:

> I certify that the information provided on this form is correct to the best of my knowledge and I understand that the law provides penalties for providing false statements in order to receive benefits. (Record p. 28)

Quest also filed a submission (Record p. 17) claiming that the act of alteration ".... calls into question the integrity (sic) which puts Quest at risk due to her lack of commitment to the company values of Quality, Integrity, Innovation, Accountability, Collaboration, and Leadership."

A scheduled fact finding interview (FFI) was scheduled for November 29, 2016 at 1:00pm by telephone. [3] The Claims Deputy from the VEC was late in calling. The Claims Deputy left the following voice mail:

> Since you were not available for the scheduled fact finding interview, an appealable decision based on information in the records will be mailed to interested parties within 5-10 business days. (Record p. 29)

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[3] Reference is made to the notice provided to Petitioner relative to FFI (Record p. 29) and the other notices generated by the VEC. These documents are confusing, dense with text, hard to read, and use tiny fonts reminiscent of antiquated software printouts.

The Claims Deputy, having the Petitioner's unequivocal denial and Quest's statement about Petitioner's malfeasance and copies of the doctor's notes in question,[4] issued a decision mailed on December 2, 2016 finding that "... the information is sufficient to establish that the Claimant was discharged due to misconduct in connection with work. Therefore, the Claimant is disqualified for benefits. (Record. P. 37)

The Petitioner duly appealed the Claims Deputy's determination on December 29, 2016. The Petitioner was informed on January 4, 2017 that a hearing would be conducted by an Appeals Examiner who "is an impartial hearing officer and trier of fact." (Record p. 39)

Petitioner received certain instructions relating to the Appeals Examiner hearing. (Record p.40) Under the heading titled "EVIDENCE" the following was provided:

> When you come to the hearing bring with you anything needed to present your case. This could be employer rules, letters, *doctor's statements*, check stubs, contracts, time records, etc. Please have a copy to leave with the Appeals Examiner and opposing party. (Emphasis added) (Record p. 40)

Thereafter, the VEC mailed a *Notice of Telephonic Hearing Before An Appeals Examiner* on January 25, 2017. On this form, there is yet another set instructions provided in very small text. (Record p. 44) In this second set of instructions there is a different requirement for the submission of evidence. Buried within the bottom third of this document is the following:

> If you have any documents to offer as evidence, mail or fax a copy to the Clerk of the Commission and to each of the other parties IMMEDIATELY.

Assuming the Notice was sent to Petitioner on January 25, 2017, and adding three days for receipt, it is reasonable to conclude that Petitioner received this notice and accompanying instructions on Saturday January 28, 2017. The next business day, therefore, was Monday, January 30, 2017. The hearing was scheduled 6 business days later. These are very tight timeframes.[5] In any case, the Petitioner complied with the rules as set forth in the Record (P. 40) and did, in fact, send to the VEC, by facsimile, documentation prior to the hearing. As well, as will be shown on page 8, below, the Appeals Examiner also faxed excluded documents to Quest. If someone did not follow the rules it was the Appeals Examiner.

The telephone hearing occurred on February 7, 2017. A decision was mailed on February 10, 2017 upholding the denial of benefits. The Appeals Examiner, citing section 60.2-618(2) noted that disqualification from benefits occurs if it is found that the a claimant was discharged for misconduct connected to work (Record p. 46) and further found that the employer proved by

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[4] See Record pp. 35 and 36 Quest themselves altered these documents by writing the words "original" and "altered"

[5] In fact, within this narrow timeframe, Petitioner was required to notify the VEC of names of witnesses *to be subpoenaed* or to provide witness affidavits. (Record P. 44)

the preponderance of the evidence that Petitioner was discharged for misconduct. The Appeals Examiner did not stop there. (Record p. 47)

"Regardless of any written rules or policies, every employee owes the fundamental duties of loyalty and honesty to his employer." (Record p. 47)

The Appeals Examiner notes that the Employer "checked with the physician's office[6] and was told the physician would not cross out or alter the note." Competing with this double hearsay statement, the Petitioner actually produced a letter from the Physician, on that doctor's letterhead, *stating to the contrary.* So what happened here?

The Appeals Examiner, Gary Coderoni, discusses the Petitioner's documentary evidence, marked as Exhibit 10[7], (Record p. 131-138) which included a letter signed by her doctor, on October 10, 2016, clearly stating that there was no alteration or forgery. The Appeals Examiner read the contents of the letter out loud. (Record p. 73)

> "To Whom it may concern, I have seen the patient in my office on 9/12 and 10/10 for a right wrist injury suffered at work. I originally wrote a note that she could return to work with minimal use of the right hand but I subsequently changed the note to state that she is to have no use of the right hand. At the time of this changed (sic) I scratched out a portion of the note and put my initials next to the error. The patient did not make any alterations

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[6] Ultimately, at the Appeals Examiner hearing we learn what happened. Lynda Yochem, an employee health nurse, testified:

> .... but I also talked to the front desk, um, person. And I asked would they ever send a note that had been altered in any way, um, because this note—With any medical provider, any nurse, any doctor, if something's marked through, it's marked through with one line, its dated, and there is (sic) initials, and this is just not marked through one line. (sic) It's several marks and there's no initials and it's not dated. And the young woman at—said, "No, we would never do that." (Record p 85 lines 22 and 23 and p 85 lines 1-4)

So, mystery solved. The front desk receptionist, speaking on behalf of the Petitioner's physician was the source which corroborated the forgery, notwithstanding the actual doctor's note to the contrary.

During the hearing the Petitioner recounted a conversation she had with her physician about this conversation Petitioner contradicted the witness's testimony by stating Dr. Weidner told Petitioner he never received that call and that the doctor had submitted the letter in question. The Appeals Examiner gave more credit to a conversation with a faceless and nameless receptionist than the sworn and direct testimony concerning a conversation the Petitioner had with her doctor, which was corroborated in writing. (Record. P 90 lines 10-12) In response, the Appeals Examiner said, "Okay, that's fine if that's – that's—what he told you then that's what he told you, okay." (Record p. 91 lines 4-5) If, in fact, Petitioner's rendition was credited in the manner the Appeals Examiner suggests, this appeal would have been unnecessary, especially given the evidentiary burden on defendant

[7] Exhibit 10 bears the following handwritten notation: *Not entered by AE but AE faxed to Empler (sic) rep during hearing* (Record p. 131)

to this work note. It would be appreciated if her job status could be reconsidered with this information in mind. Please call us with any questions.[8] Signed, Zachary D. Weidner, MD (see also Record p.134)

With regard to this exhibit, the Appeals Examiner refers to it as "a late submission." (Record p. 73) The Petitioner acknowledged that she, given the tight timeframes and her receipt of the Notice on the weekend, did not send this document to Quest. (Record p. 74-75)

Then, the Appeals Examiner refers the Petitioner to the "yellow paper[9]" she received. (Record p.75 L.16) Then the Appeals Examiner states:

> ....If you have additional documents you would like to submit, you must send them to First Level Appeals and, underlined, to the opposing party. The documents must reach all parties at least two days before the hearing. Okay? (Record p. 75 lines 1-5)

The Petitioner responded as follows:

> Is, uh—Uh, what happen (sic) was I just received it, um, before the weekend so I didn't get the chance to, um, few days, but, um, I did, uh—I did send it Virginia Commission (sic), to you, yesterday. (Record p. 75 Lines 1-17)

The Appeals Examiner makes the following confusing reply:

> Okay, so because you didn't send it to the employer we can't put it on the record of the hearing; however, *you can talk about it if you like*. We just can't <u>make it part of the official record</u> because they didn't receive a copy, okay? (emphasis added) (Record p. 75 lines 19-21)

Then it gets worse. The Petitioner was about to question Ms. Yochem, Quest's witness, about Dr. Weidner's exculpatory letter and the Petitioner asked the Appeals Examiner about that.

> Um, am I allowed to, um—I mean the documents, if I faxed, um, to Virginia, uh, Commission yesterday am I allowed to talk about it? (Record p. 85 lines 17-18)

This was the Appeals Examiner's reply:

> Well, that—You can *talk* about it, <u>but you can't ask her questions about it</u> if she didn't get it. (Record p.85 lines 20-21)

The court can only imagine the Petitioner's confusion at this point.

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[8] No call was ever made. Ever.

[9] The Record does not contain a yellow piece of paper and was not otherwise identified for purposes of the Record.

With regard to the documentary evidence requirement used to Petitioner's absolute prejudice, the Court has reviewed the entirety of the record submitted and found no such instruction and, as well, at oral argument, the issue was conceded. It appears that the Appeals Examiner just made it up.

The process then completely leaves the rails. It becomes a train wreck. In the Appeals Examiner's opinion, he writes about the letter, which was not received into evidence (or was it?) and states:

> This letter (copy at Record p. 52) contains a signature that differs from the original signature on the doctor's note. (copy at Record p. 35 and 36)..... Secondly, the handwriting which appears on the altered note indicating "no use" is not the same handwriting which appears on the remainder of the note. (Record p. 48)

So, there it is. The Appeals Examiner compared the words 'no use" to the rest of the words on the document and found that the hand writing did not match. As well, the Appeals examiner compared the signatures on the doctor's note to the signature on the doctor's correspondence and found they did not match. Of course, these are not handwriting exemplars and it is doubtful that the Appeals Examiner is an expert in the field, but this is, apparently, how the appeal was ultimately adjudicated. This is truly inexplicable.

As indicated above, during the course of the hearings, Petitioner presented a letter from Dr. Zachary D. Weidner, M.D in which the doctor makes clear he was the one who wrote the interlineation. Defendant never, at any time, objected to the authenticity or admissibility of the letter and no evidence to the contrary was presented. Even though the Appeals Examiner declined to enter that letter into the record, *sua sponte*, he questioned the Petitioner about it and then, on his own initiative, sent the letter by facsimile to the Quest representative during the hearing.[10] (Record p. 89-92)

> GARY CODERONI
>
> Okay. Okay. So then -- All right. So now we had some discussion before the hearing about a letter that was sent to you, well, to whom it may concern, actually, from the doctor. Now this letter was not-- You didn't send it to-- to the employer and neither did the doctor so they don't have this letter. So, um, I think, uh, because it seems to go to the cruxed (sic) of the matter, uh, we need to at least, uh, *discuss it a little bit.* So because I

[10] Amazingly, even though the Appeals Examiner sent the doctor's letter to the Quest representative, he asked her *not a single substantive question* about the letter. He did not even ask the Quest representative if she had ever seen the letter before. Finally, even after discussing the letter and faxing the letter to Quest, the Appeals Examiner apparently, although the court is not really sure, neither admits the letter into evidence nor allows the Petitioner to question the Quest witness about it.

> couldn't enter the letter into the record, why don't you tell me how this letter whose—That's dated, uh, October the 10th, 2016 came to be. (Record p. 89 Lines 22-23 and Record p.90 Lines 1-6) (emphasis added)

Further into the hearing, the Appeals Examiner appears to have an epiphany:

> GARY CODERONI
>
> Okay, um, huh, let's see. Oh, uh, you know, I was thinking, Ms., uh Aleemi, do you have access to a fax machine very quickly or close to you?
>
> VIRGINIA ALEEMI
>
> Um, yes I do, actually.
>
> GARY CODERONI
>
> Okay, you know, I think it might be really good if I can fax you this letter. It wouldn't take too long. It's right across the hall from me. Um, and I do think, um, it might be helpful that way, at least you have the copy of the letter, uh, then, you know, *we can discuss it more*. It—It'd be easier for you. So why don't you give me, um, your fax number? (emphasis added)
>
> GARY CODERONI
>
> Okay, so now I think wha (sic)—Well, I – Why don't you take a second to read it and then, um, I'll ask, uh, Ms. Bailey about it and – because then you'll know what it says.
>
> VIRGINIA ALEEMI
>
> Okay, I've read it.
>
> GARY CODERONI
>
> Okay. All right, so now, Ms., uh Bailey, Ms. Uh, Aleemi has read the letter so she has it.
>
> (Record p. 91 Lines17-22; p.92 Lines 1-5; p.93 Lines 19-21; p. 94 Lines 22-24)

Notwithstanding the Petitioner's evidence, at least the evidence that may or may not have been considered or may or may not have been admitted in the formal record, Petitioner lost her appeal.

Petitioner noted her appeal to the Virginia Employment Commission on February 26, 2017. Notwithstanding the questionable fact finding and legal conclusions from the preceding Appeal, the VEC adopted the Appeals Examiner's finding of facts, *in toto*. Petitioner lost again and this appeal follows.

Petition for Judicial Review

In her argument, Petitioner contends that during her first appeal, she provided a letter from Dr. Weidner dated October 10, 2016. The doctor affirmatively stated that it was he rather than the Petitioner who was responsible for the alteration. (Record P. 134) Nonetheless, the Appeals Examiner found that Defendant had provided credible testimony and documentation. In response, Petitioner contradicted that testimony by stating Dr. Weidner told Petitioner he never received that call and that the doctor had submitted the letter in support. (see footnote 6, above)

Ultimately, the Appeals Examiner decided that Quest had met its burden that the note(s) was a forgery and thus misconduct. The Appeals Examiner, in substantial fashion, made factual and credibility determinations based on a document he indicated was not admitted into the record because Dr. Weidner's letter was not provided to the Defendant prior to the hearing pursuant to a fictitious appellate procedure and that the handwritten interlineation and doctor's signatures did not match the handwriting on the remainder of the doctor's note.

When Petitioner appealed directly to the VEC, The VEC ruled that Petitioner was disqualified from receiving unemployment compensation effective November 6, 2016 based upon review of the record established by the Appeals Examiner's hearing, pursuant to 16 VAC 5-80-30(B). In this next level of appeal, additional evidence and testimony can be submitted. Petitioner sought to have additional evidence admitted that could have been presented at the prior hearing through the exercise of due diligence. The submission of that evidence and particularly the letter of Dr. Weidner (Record p. 52) was denied by the VEC. There can be no question that this letter is exculpatory. There can be no question that the letter was excluded based upon a rule, regulation or procedure entirely absent from the record. Yet the VEC opinion states:

> In this case, the evidence which the claimant seeks to have admitted does not meet the criteria set forth above. Specifically, she has not shown that this evidence could not have been presented at the prior hearing through the exercise of due diligence. Therefore, the request for the taking of additional testimony and evidence is denied and this decision is based solely on the existing record. (Record p. 55)

There are two problems with this ruling. First, the record upon which the VEC relies is in disarray. The letter was not admitted into the record, yet the handwriting and the signature at the end of that letter and within the doctor's notes were used for purposes of a handwriting comparison by the Appeals Examiner which formed a crucial part of his decision. (Record p.48) Second, the VEC used the wrong standard.

While reference is made to language of 16 VAC 5-80-30 (B), it is instructive to actually see the <u>whole</u> code section as written:

> *B Except as otherwise provided by this chapter, all appeals to the commission shall be decided on the basis of a review of the evidence in the record The commission, in its*

> *discretion, may direct the taking of additional evidence after giving written notice of such hearing to the parties, provided:*
>
> *1 It is shown that the additional evidence is material and not merely cumulative, corroborative or collateral, could not have been presented at the prior hearing through the exercise of due diligence, and is likely to produce a different result at a new hearing; or*
>
> *2. The record of the proceedings before the appeals examiner is insufficient to enable the commission to make proper, accurate, or complete findings of fact and conclusions of law*

All the VEC did, in adopting the Appeals Examiner's record was to baldly assert that the doctor's letter, which was brought to the hearing by the Petitioner in conformance with VEC's own instructions and then faxed to the Quest witness, should be excluded because the Petitioner failed to exercise due diligence relative to the production of this letter. This is just wrong.

Moreover, the VEC does not analyze the evidence in light of the code's directive. The VEC did not, apparently, consider the elements set forth in section 1. Clearly the doctor's letter was:

i. Material;
ii. Not cumulative;
iii. Actually was presented, though not received at the prior hearing; and
iv. Had it been considered was likely to produce a different result.

Further, the second prong of 16 VAC 5-80-30 (B) is implicated. (*The record of the proceedings before the appeals examiner is insufficient to enable the commission to make proper, accurate, or complete findings of fact and conclusions of law.)* In this case the record is confusing, relies on secret and unwritten rules, is partly based upon lay handwriting and signature comparison analysis and the findings of fact and conclusions of law are based upon the flawed record yielding a result which was arbitrary, capricious and utterly at variance with reality.

The VEC ruled that the underlying record established that the Petitioner was discharged for misconduct as defined by Va. Code §60.2-618(2) in connection with her work. However, there **is** evidence on the record to suggest that a reasonable mind would necessarily have come to a different conclusion in this case. Furthermore, based upon a review of the record as a whole, this court finds that the process and result, at all levels of review, was arbitrary and capricious.

Standard of Review

Virginia Code §60.2-625(A) sets forth the standards to be followed from an appeal from a decision of the Commission. Specifically, the Code states:

> "[i]n any judicial proceedings under this chapter, the findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." *Id.*

Moreover, whether an employee's behavior constitutes "misconduct in the context of unemployment compensation is a mixed question of law and fact." *See Scarborough v Va Empl. Comm'n*, 2008 Va. App. LEXIS 462 (2008)(quoting *Israel v Virginia Employment Comm'n*, 7 Va. App. 169, 172 (1988)).

By statute, "the findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." Code § 60.2-625(A). This statutory standard of judicial review does not invite a reviewing court to examine the administrative record *de novo* and to reweigh the possible inferences that could be drawn from it. Instead, a court can overturn VEC factfinding "only if, in considering the record as a whole, a reasonable mind would necessarily come to a different conclusion." *Craft v. Va Empl. Comm'n*, 8 Va.App. 607, 609, 383 S.E.2d 271, 273 (1989) (emphasis in original) (citations omitted). This deferential standard applies not only to the historical facts themselves, but also to the inferences implicated by those facts.

Equally important, a reviewing court cannot "substitute its own judgment for the agency's on matters committed by statute to the agency's discretion." *Boone v. Harrison*, 52 Va.App. 53, 62, 660 S.E.2d 704, 708 (2008). Instead, "when the appellant challenges a judgment call on a topic on which 'the agency has been entrusted with wide discretion by the General Assembly,' we will overturn the decision only if it can be fairly characterized as 'arbitrary or capricious' and thus a 'clear abuse of delegated discretion.' "*Citland, Ltd. v. Commonwealth ex rel. Kilgore*, 45 Va.App. 268, 275, 610 S.E.2d 321, 324 (2005) (citation omitted). "This standard recognizes the larger premise that, before any legal question can be answered, an *a priori* question must first be asked-who has the authority to decide. It is the one question that precedes all others." *Boone*, 52 Va.App. at 62, 660 S.E.2d at 708.

Analysis

Va. Code §60.2-618(2) requires that an employee who was discharged for misconduct by an employer is disqualified from receiving unemployment benefits. The same code section indicates that "misconduct" occurs when an employee:

> . . . *deliberately* violates a company rule reasonably designed to protect the legitimate business interest of his employer, or when acts or omissions of such a nature or so recurrent as to manifest a *willful* disregard of those interest and duties and obligations he owes his employer. *Scarborough v. Va. Empl Comm'n*, supra, at 11 (emphasis provided).

The Court is under a strict standard of review when considering an appeal from a decision made by the VEC. Under no circumstances should a court re-weigh the evidence

provided at a hearing or attempt to find facts that are not in the Record and the court must consider evidence in light most favorable to the finding by the Commission. *Kosiek v Va Empl. Comm'n*, 59 Va. Cir. 377 (2002)(citing *Virginia Employment Comm'n v. Peninsula Emergency Physicians, Inc.*, 4 Va. App. 621, 626 (1987)). However, the Court has the ability to consider questions or issues of law *de novo*.

In this case, the question of what constitutes misconduct is a mixed question of law and fact. *Virginia Employment Comm'n v. Sutphin*, 8 Va. App. 325, 327 (1989). The Court is in a posture in which it must rely on the evidence below to determine if the agency decision, in finding that Petitioner was fired for misconduct, is supported by the record as a whole and that, after considering the record as a whole, no reasonable mind could necessarily come to a different conclusion.

The VEC argues that misconduct, as statutorily defined in Va. Code §60.2-618(2), includes a duty of honesty to one's employer. The statute does not expressly indicate a duty of honesty, and in fact that word is not even used. The VEC concedes that it is within the Court's authority to review the VEC's decision as to what constitutes misconduct and argues that a duty of honesty exists between employers and their employees. The court does not disagree.

Nevertheless, the VEC found credibility issues with the Petitioner's presentation of Dr. Weidner's letters[11], Petitioner's testimony, and Petitioner's evidence in general. In a brief explanation, the VEC indicates that, contrary to Dr. Weidner's assertion, the doctor's initials were missing from the altered Note and that there were issues with the dates on both the Note and the subsequent letter provided by Dr. Weidner. While the Court cannot and will not re-weigh evidence or consider credibility, the Court may consider if the Record supports the VEC's decision to uphold Defendant's decision to terminate Petitioner for misconduct. <u>It does not</u>.

The Court will not question that an individual who alters a doctor's note is guilty of misconduct under §60.2-618(2) for the purpose of disqualification of benefits. The issue at this point is if a reasonable mind would necessarily come to the conclusion the VEC did after the Petitioner presented her mitigating evidence. Also, given the procedural history as outlined above, the clear due process irregularities and the manufacturing of evidentiary rules, the court

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[11] Although it is a confusing an open question on this record as to whether or not·

1. The letter was actually admitted in the first place; and

2 Properly and accurately considered (By the Appeals Examiner comparing signatures and handwriting, making credibility determinations based upon the signature and handwriting comparisons which determinations were adopted by the VEC at the next level appeal.)

must determine whether the process and the result generated from that process is arbitrary and capricious.[12] It was. This case presents, without ambiguity, a clear abuse of delegated discretion.

Dr. Weidner provided the VEC with two letters stating that he was the author of the Note with interlineation. Moreover, Petitioner's testimony was consistent with Dr. Weidner's statements. The Appeals Examiner excluded Dr. Weidner's first letter on the basis that it did not comport with the appellate rules provided to Petitioner prior to the hearing. Upon review of the Record, it is clear that no such instructions were ever given to the Petitioner and the Appeals Examiner contrived the requirement upon which he then relied to exclude Dr. Weidner's Letter. Such action was arbitrary and capricious. Such action was undertaken without consideration or in disregard of facts or law or without determining principle. Further the Appeals Examiner departed from the appropriate standard in making its decision. By adopting the Appeals Examiner's findings, the VEC's actions were likewise arbitrary and capricious.

The VEC argues that Dr. Weidner's letter was excluded from evidence during the hearing because it was provided too late. Petitioner was dismissed by Defendant on September 30, 2016 and she sent the letter from Dr. Weidner to the Appeals Examiner conducting the hearing on October 10, 2016, which was one day prior to the actual hearing. The Record indicates that the Appeals Examiner did not include it in evidence because a copy had not been provided to the Defendant. It is worth noting that the instructions provided to Petitioner specifically states she only had to bring the letter with her to the hearing, not provide it ahead of time.[13] Then a second, and confusing set of instructions, was sent to the Petitioner changing the hearing to a telephone hearing with a different set of instructions for submitting evidence. During oral argument, counsel conceded that the Appeals Examiner erred in this determination.

The VEC incorporated the Appeals Examiner's decision entirely, without separate review, when rendering its decision. No reasonable mind could necessarily come to the conclusion that the doctor's letter, claiming responsibility for the interlineation, was not a mitigating circumstance to afford Petitioner protection under the statute. While the circuit court may not reweigh an agency's determination as to credibility or weight regarding evidence, given these circumstances, the clear error by the Appeals Examiner prevents a reasonable mind from coming to the same conclusion as the VEC, and this determination is well within the court's reviewing authority.

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[12] For a definition of this term *See James v City of Falls Church*, 280 Va. 31, 42, 694 S.E.2d 568, 574 (2010) holding that an action is "'**arbitrary and capricious**' when it is willful and unreasonable and taken without consideration or in disregard of facts or law or *without determining principle*, or when the deciding body departed from the appropriate standard in making its decision" (emphasis in original), as cited within *Va Bd of Med v Zackrison*, 67 Va. App. 461, 476, 796 S.E.2d 866, 873 (2017)

[13] See Record at p 40

While the VEC did not have to state its reasons for determining the weight or credibility of evidence, *Virginia Employment Comm'n v. Gnatt*, 7 Va. App. 631 (1989), the employer must meet its burden to prove the employee's misconduct by a preponderance of evidence and also allow the employee an opportunity to present mitigation evidence. *See Blake v. Hercules Inc.*, 4 Va. App. 270, 273 (1987); *see also Va Code Ann §60 2-618*. Defendant, in review of the whole record, did not satisfy its burden simply by providing one statement that the Note was altered by Petitioner without any other proof and "[a] forfeiture of benefits will only be upheld where the facts clearly demonstrate misconduct." *See Kennedy's Piggly Wiggly Stores, Inc. v. Cooper*, 14 Va. App. 701, 707 (1992)(internal quotation omitted).

The facts in the Record, including Dr. Weidner's letters which are, interestingly, included in the Record, do not demonstrate misconduct on part of the Petitioner. The Appeals Examiner's decision to not admit the first letter from Dr. Weidner into the Record despite Petitioner complying with the appeal procedure arbitrarily and capriciously prevented Petitioner's valid mitigating circumstances argument from reaching the VEC. Moreover, the VEC further muddied the water by excluding Dr. Weidner's second corroborating letter based on the incorrect finding that Petitioner failed to show that this letter could not have been provided earlier through exercise of due diligence.[14] (See also the discussion of this standard on pp. 9 and 10, above)

While it is clear that the Defendant did not meet its burden in clearly proving Petitioner engaged in misconduct, Petitioner further provided mitigating circumstances improperly excluded at all stages for erroneous procedural reasons. Accordingly, the determination of Petitioner's misconduct under the statute was reached completely in error and by and through a process which was arbitrary and capricious.

Under Va. Code §60.2-618(2), providing an employer an interlineated doctor's note that the doctor himself, multiple times, claims responsibility for interlineating is not misconduct under the statute. Misconduct is a mixed question of law and fact. As a matter of law, the forgery alleged was entirely unsubstantiated and improperly found and there is no misconduct on this record.

No reasonable mind could come to the conclusion that Petitioner altered the Note in light of the Record and any finding to the contrary reflects a process, analysis and conclusion which is arbitrary and capricious and accordingly the Petition for Judicial Review is granted and this matter is remanded to the agency for further proceeding.

Mr. Sutter will please prepare an order reflecting the Court's ruling. Once the order is endorsed by Ms. Peay and Mr. Barmak, it should be returned to me, Attention Law Clerk 15, for

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[14] See Record at p 55

entry. In case there is some dispute about the contents of the order, I will place the matter on the court's civil motions docket on October 6, 2017 at 10:00am.

[redacted]

Very truly yours,

[redacted]

Thomas P. Mann

OPINION LETTER